IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O. C.J.

S.C. Suit No.352 of 1984

Hindustan Organic Chemcials Ltd.... Plaintiff

V/s

1. M/s Wintech Chemicals Industries
2. Mr.Girishbhai Tank
3. Jabtaveb @ Hansaben Ashwinbhai Tank..Defendants

Mr.A.R.Shinde i/b Sharad G. Shinde for Plaintiff

Mr.A.V.Joshi,Chief Personnel Manager of Plaintiff is present

Ms Rita Rahimtoola i/b M.K.Ambalal and Co. for Defendant no.2

CORAM:S.R.SATHE,J.

DATED:22nd Nov. 2005.

ORAL JUDGMENT :-

1. The plaintiff were carrying on business of manufacture and sale of certain basic organic chemicals such as Orthonitro Toluene, Nitro Benzene, Orthonitro Chloro Benzene, PNT etc., have filed this suit against the defendants for recovery of amount of Rs.11,27,373-2 ps.

2. Plaintiffs case in brief is that the defendant is

a partnership firm and the defendant nos.2 and original defendant no.3 were partners of defendant no.1 firm at the material time. Defendant no.3 died during pendency of this suit and as such his legal representative defendant no.3A has been impleaded. According to the plaintiffs the defendants used to purchase regularly various basic organic chemicals from the plaintiffs and they had maintained a regular account of the defendants in their books of accounts. During the period from 20-1-1981 to 25-2-1981 the defendant no.1 firm purchased various chemicals as mentioned in the plaint and Invoices Exh.B,C,E,G,H,J and L attached with the plaint. The defendants made payment from time to time. Considering the said payment amount of Rs.6,55,959-64 ps was due from the defendants. As mentioned in the Invoices plaintiff were entitled to get 1% as delayed payment charges. In spite of repeated demands the defendants failed to clear their dues. Even after issuance of notice through Advocate the defendants did not clear the dues. The plaintiffs, therefore filed the present suit and claimed amount of Rs.6,55,959-64 ps. and interest on the said amount at the rate of 24% p.a. in all Rs.11,27,373-2 ps. and future interest on the amount of Rs.6,55,959-64 ps at the rate of 24% p.a.

3. The defendant nos.1 and 3 failed to file written statement. So also the defendant no.3A did not file any written statement.

4. Defendant no.2 filed his written statement on 10-8-2005 and denied plaintiff's claim. It is the contention of the defendant no.2 that pursuant to the agreement executed on 5-12-1980 between him and original defendant no.3 he retired from defendant no.1 firm from 1-12-1980. All the transactions mentioned by the plaintiff in the plaint are pertaining to the period subsequent to 1-12-1980. The defendant no.2 therefore contended that at the material time he was not at all a partner of the defendant no.1 firm and as such there was no reason for the plaintiff to file suit against him and hence the suit against him is liable to be dismissed with costs.

5. On the pleadings of the parties following issues are famed by the Court (Coram:A.S.Aguiar,J). I have given my findings as mentioned against the same.

1. Whether the plaintiffs prove that Defendant no.2 was partner in the Defendant no.1 Firm at the material time when the cause of action arose?	No
2. Whether the plaintiffs prove that Defendant no.2 has signed any documents for and on behalf of Defendant no.1 Firm?	No

3. Whether the Defendant no.2 proves that he retired from the Defendant no.1 firm with from 1st December,1980 — Yes

4. What order and relief? — As stated in the present order.

6. At the outset it must be mentioned that all the allegations in the plaint have gone unchallenged by the defendant nos.1 and 3 and subsequently by defendant no.3A and as such the same are deemed to have been admitted by the defendant nos 1 and 3A. However, it is necessary to see whether decree as prayed can be granted. The plaintiffs' witness A.V.Joshi, Additional chief Manager of the plaintiff company has filed his affidavit of evidence on 9-8-2005 and has duly proved all the documents on which plaintiffs are relying. He has categorically stated that defendant no.1 firm purchased basic organic chemicals from the plaintiffs from time to time during period from 20-1-1981 to 25-2-1981 under the Invoices mentioned earlier. He has also stated that after giving credit to the payment made by the defendants amount of Rs.6,55,959-64 ps. was due from the defendants. As per endorsement made in the Invoices plaintiffs were to get delayed charges and defendants are liable to pay interest at the rate of

24% p.a. on the above mentioned amount. Thus he has stated in all amount of Rs.11,27,373-02 ps. was found due and payable by the defendants and hence the plaintiffs have claimed such amount in the suit and the suit claim is correct. All this evidence of plaintiff's witness has gone totally unchallenged. The defendant no.2 has not cross examined plaintiffs.

7. From the documents produced on record it is very clear that prior to filing of the suit plaintiffs had issued notice through Advocate to the defendants on 18-6-1982. The said notice was replied by the defendants. The said reply is produced at Exh.5. Even from the perusal of the said reply it is very clear that defendants had clearly admitted the liability of Rs.6,55,959/-. 8. It is not known on what basis interest at the rate of 24% is claimed. The learned advocate for plaintiff could not support the same. Even if it is taken that 1% is to be charged for delayed payment it would not be 24%. The plaintiff has charged exorbitant interest. At the most 12% p.a. interest can be granted.

9. It is the contention of the defendant no.2 that at the material time he was not partner of the defendant no.1 firm. In order to prove this, he has produced on record true copy of the Registration of Certificate issued by the Registrar of Firms, Surat. The same is not disputed by plaintiff. From the perusal of the

same it is very clear that defendant no.2 has retired from the defendant no.1 firm with effect from 1-12-1980 and entry in that behalf has been made in the register on 17-1-1981. Not only that but it appears from the record that when the defendant no.1 admitted his liability by giving reply they even informed the plaintiff that defendant no.2 is not partner of the said firm. Even from the plaintiffs' own pleadings it is very clear that purchases in question are made by the defendant no.1 after the retirement of the defendant no.2. So, it is crystal clear that the defendant no.2 is not at all liable to pay the plaintiffs due as claimed in the plaint and suit against the defendant no.2 shall have to be dismissed.

. For the reasons stated above, the following order :

i. The defendant no.1 and 3 to pay plaintiff an amount of Rs.6,55,959064 ps. and interest on the said amount at the rate of 12% p.a. from 21-5-1982 till filing of the suit and future interest on such amount at the rate of 9% p.a. from the date of the suit till realisation of the amount.

ii. The liability of Defendant no.3A is to the extent of assets he has received of the deceased defendant no.3.

iii. The defendant no.1 and defendant no.3A to pay proportionate cost of this suit to the plaintiffs and bear their own.

iv. The suit against the defendant no.2 stands dismissed with costs.

(S.R.SATHE,J.)